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INTRODUCTION

In the 1984 case of *Nix v. Williams*, the Supreme Court officially adopted the inevitable discovery doctrine as an exception to its judicially created exclusionary rule.[1] Under the inevitable discovery doctrine, evidence that would normally be excluded will not be suppressed if the prosecution can establish by a preponderance of the evidence that it would have inevitably been discovered by lawful means.[2] In essence, the prosecution relies upon a hypothetical independent source to admit evidence that was actually obtained in violation of the defendant's constitutional rights.

The starting point in inevitable discovery cases is police misconduct, as the evidence was actually obtained in violation of the defendant's personal constitutional rights. Yet, if the prosecution can point to alternative, lawful means that would have uncovered the evidence, then a court will excuse the violation and allow the evidence to be admitted. In the typical inevitable discovery case, there is only one defendant at issue, and the scope and interpretation of the lawful means requirement is clear. For example, in *Nix*, police officers discovered the location of a murder victim's body as a result of an illegal line of questioning of the defendant (at the time a suspect in custody).[3] At the same time that the defendant's rights were being violated, a search party of over two hundred community volunteers was close to finding the body.[4] At trial, the prosecution relied on this search party to prove that the body would

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1. Nix v. Williams, 467 U.S. 431 (1984).
2. *See id.* at 444.
3. *Id.* at 435–36.
4. *Id.* at 434–36.

have been inevitably discovered even if police officers had never illegally questioned the defendant.[5] Thus, in *Nix*, it was clear that the means relied on in the prosecution's hypothetical were in fact "lawful." Nonetheless, *Nix* does not answer the question of how the lawful means requirement should be interpreted when there is more than one defendant. For instance, police may illegally search one party and then seek to use that evidence to argue that the discovery of evidence against the relevant defendant was inevitable.

At first blush, it seems clear that relying on an illegal search of a third party would run afoul of the requirement that the evidence be obtained by lawful means. Nevertheless, in a separate line of cases, the Supreme Court has expressly prohibited vicarious exclusionary challenges.[6] In a vicarious exclusionary challenge, a defendant attempts to suppress incriminating evidence because it was illegally obtained from someone else. By prohibiting such a challenge, the Supreme Court has injected a personal, relational concept into its exclusionary rule jurisprudence, suggesting that all exclusionary rule cases should be analyzed through a lens focused only on the relevant defendant before the court.

The prohibition against vicarious exclusionary challenges creates ambiguity in the interpretation of the word "lawful" as used in *Nix*, and in particular, to whom the lawfulness must apply. Reasonable jurists can differ as to the resolution of the apparent conflict, as shown by the circuit split that lies at the heart of this Note. For instance, in *United States v. Scott*, the First Circuit allowed the prosecution to rely on evidence taken in violation of a third party's constitutional rights to invoke the inevitable discovery doctrine against the relevant defendant.[7] By contrast, three years later in *United States v. Johnson*, the Seventh Circuit prevented the prosecution from relying on an illegal search of a third party to show that the evidence used against the defendant would have been inevitably discovered.[8]

In neither case were legal means used. The evidence was actually obtained in violation of the defendant's rights, and the prosecution relied on violations of a third party's rights. Yet the divergent conclusions hinged on the respective court's interpretation of the word "lawful" when applied to the inevitable discovery doctrine, in light of the Supreme Court's prohibition on vicarious exclusionary challenges. Essentially, the First Circuit interpreted the lawful means requirement as merely "lawful

5. *Id.* at 437.

6. *See* United States v. Payner, 447 U.S. 727, 731–33 (1980); Rakas v. Illinois, 439 U.S. 128, 133–38 (1978); Alderman v. United States, 394 U.S. 165, 171–76 (1969).

7. 270 F.3d 30, 42–45 (1st Cir. 2001).

8. 380 F.3d 1013, 1017 (7th Cir. 2004).

in relation to the relevant defendant before the court," while the Seventh Circuit interpreted the lawful means requirement to mean "lawful to the world."[9]

These cases disclose a divergence in application of a doctrine that is already rife with criticism and calls for limitations, setting the stage for the Supreme Court to resolve the debate. This Note focuses on the lawful means requirement and engages in a comprehensive analysis to determine the correct interpretation in light of the Supreme Court's prohibition against vicarious exclusionary challenges. As background, it lays out the inevitable discovery doctrine, and explains its foundation as an exception to the exclusionary rule. The Note will then clarify the unique sets of facts that gave rise to the circuit split and explain the reasoning behind the divergent conclusions.

The analysis is based on a hypothetical factual scenario that mirrors the novel set of circumstances confronted by the First Circuit in *Scott* and the Seventh Circuit in *Johnson*. Applying the inevitable discovery doctrine to the hypothetical, this Note asserts that the Seventh Circuit's broad interpretation of the lawful means requirement must be the correct one from the standpoint of promoting justice. This Note explains why Judge Posner's invocation of tort law is an excellent way to diffuse the seemingly irreconcilable conflict between a broad interpretation of the lawful means requirement and the prohibition against vicarious exclusionary challenges.[10] Yet it also recognizes logical inconsistencies in Judge Posner's analogy of the inevitable discovery doctrine to the tort doctrine of concurrent causation.[11]

When such a prominent legal scholar weighs in on an issue that could have tremendous importance in the criminal procedure realm and law enforcement, it is necessary to closely inspect his decision. As this Note demonstrates, the better analogy is the differing conceptions of the duty element of negligence actions, revealed in the seminal tort case of *Palsgraf v. Long Island Railroad Co.*[12]

Ultimately, the *Palsgraf* opinion offers an instructive framework that helps reconcile the conflict between the prohibition on vicarious exclusionary challenges and interpreting the lawful means requirement as lawful to the world. The analogy sets forth well-established legal principles that provide an avenue to reach the only conclusion that protects the integrity of the inevitable discovery doctrine.

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9. The respective interpretations are in quotation marks for ease of understanding to the reader. These phrases were *not* used by the First and Seventh Circuits in their opinions.

10. Some legal scholars have already employed the strategy of solving problems in the criminal procedure realm with principles of tort law. *See, e.g.*, Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 NW. U. L. REV. 1053 (2005).

11. *See Johnson*, 380 F.3d at 1016.

12. 162 N.E. 99 (N.Y. 1928).

I. BACKGROUND

A. AN EXCEPTION TO THE EXCLUSIONARY RULE

The inevitable discovery doctrine is an exception to the judicially created exclusionary rule, which bars the court from admitting evidence that was obtained as a result of police misconduct. Accordingly, it is necessary to briefly explain the operation of the exclusionary rule in order to understand the inevitable discovery exception.

The exclusionary rule entered the realm of criminal procedure in 1914 with the seminal case of *Weeks v. United States*, where the Supreme Court held that evidence obtained by an unreasonable search or seizure is inadmissible and cannot be introduced at a subsequent trial.[13] Nearly fifty years later, the Court extended the reach of the exclusionary rule by means of the Fourteenth Amendment, making it applicable to state-based prosecutions.[14] In essence, the judicially created doctrine dictates that "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure."[15] In addition, the doctrine applies to Fifth and Sixth Amendment violations.[16] Furthermore, the exclusionary rule prohibits admission not only of the evidence directly obtained from police misconduct, but also evidence derived from the primary illegality, cleverly dubbed "fruit of the poisonous tree."[17]

Although several policy rationales have been asserted for the exclusionary rule in its near-century of existence, deterrence of future police misconduct has emerged as the primary justification. The Supreme Court has recognized the tremendous social cost of excluding highly probative evidence of a crime, but nonetheless maintains it is necessary to deter police from violations of constitutional protections.[18] In the words of Justice Powell, "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[19] The purpose of the exclusionary rule is to "compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[20] "Despite its broad deterrent

13. 232 U.S. 383, 398 (1914).

14. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

15. United States v. Calandra, 414 U.S. 338, 347 (1974).

16. *See* Nix v. Williams, 467 U.S. 431, 442 (1984).

17. Wong Sun v. United States, 371 U.S. 471, 487–88 (1963).

18. *Nix*, 467 U.S. at 442–43.

19. *Calandra*, 414 U.S. at 348. Despite the word "remedy" in his description, Justice Powell was careful to point out that the purpose of the exclusionary rule was not to afford a remedy to the victim of the illegal search. *Id.* To the contrary, the rule "is calculated to prevent, not to repair. Its purpose is to deter . . . ." *Id.* at 347–48 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

20. *Elkins*, 364 U.S. at 217 (citing Eleuteri v. Richman, 141 A.2d 46, 50 (N.J. 1958)).

purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons."[21] As the Supreme Court emphasized in *United States v. Calandra*, "the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."[22] Accordingly, the Court has carved out several exceptions to the exclusionary rule for circumstances under which its deterrent purpose is not furthered.

The first exception, coming just six years after *Weeks*, and the one from which the inevitable discovery doctrine was brought to life,[23] is the "independent source" doctrine. In *Silverthorne Lumber Co. v. United States*, Justice Holmes emphasized that facts obtained in violation of a defendant's constitutional rights do not become "sacred and inaccessible."[24] Rather, "[i]f knowledge of them is gained from an independent source they may be proved like any others . . . ."[25] "For example, where an unlawful warrantless search has given the police knowledge of facts *A*, *B*, and *C*, but fact *C* has also been learned by other means, fact *C* can be admissible at trial because it was derived from an independent source."[26] Over forty years later, *Wong Sun v. United States* reaffirmed and expanded *Silverthorne*, creating a second exception to the exclusionary rule.[27] There, the Supreme Court reasoned that not "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police."[28] Rather, the more important question is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[29] In an investigation that begins with illicit police conduct, a subsequent act of free will on the part of the defendant is a good example of something that would dissipate the taint.[30] With the Supreme Court willing to forego the

21. *Calandra*, 414 U.S. at 348.

22. *Id.*

23. In *Murray v. United States*, the Supreme Court characterized the inevitable discovery doctrine as an "extrapolation" from the independent source doctrine. 487 U.S. 533, 539 (1988).

24. 251 U.S. 385, 392 (1920).

25. *Id.*

26. Troy E. Golden, *The Inevitable Discovery Doctrine Today: The Demands of the Fourth Amendment,* Nix, *and* Murray, *and the Disagreement Among the Federal Circuits*, 13 BYU J. PUB. L. 97, 98 (1998).

27. Wong Sun v. United States, 371 U.S. 471, 488 (1963). A third exception to the exclusionary rule was recognized in the case of *United States v. Leon*, 468 U.S. 897, 913–17 (1984) (holding where an officer acted in good faith upon a facially valid warrant issued without probable cause, deterrence usually does not justify applying the exclusionary rule).

28. 371 U.S. at 487–88.

29. *Id.* at 488 (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

30. For example, in *Wong Sun*, the Court found that the fact that the defendant was released on

exclusionary rule under circumstances when its deterrent purpose was not properly served, the stage was set for yet another exception.

B. *NIX V. WILLIAMS*: ADOPTION OF THE INEVITABLE DISCOVERY DOCTRINE

The Supreme Court officially adopted the "inevitable discovery" exception to the exclusionary rule in *Nix v. Williams*, affirming the conviction of an escaped mental patient who had kidnapped and murdered a ten-year old girl roughly fifteen years earlier.[31] The fifteen years of costly litigation ensued because the primary evidence used to convict Williams—the dead body of ten-year old Pamela Powers—was obtained as a result of police misconduct.[32] Specifically, Detective Leaming coaxed Williams into disclosing the whereabouts of the victim's body by appealing to his religiosity through the now infamous "Christian Burial" speech,[33] which the Court ultimately held to be a violation of Williams's Sixth Amendment right to counsel.[34]

The facts of *Nix* presented a particularly compelling challenge to the exclusionary rule under which, as then-Judge Cardozo observed, "[t]he criminal is to go free because the constable has blundered."[35] Indeed, *Nix* brought to bare Judge Cardozo's prophetic fear that the exclusionary rule may someday be used to suppress evidence relating to the body of a murdered victim because of the means by which it was found.[36] What separated *Nix* from cases that actually realized Judge Cardozo's fears, however, was that the body would have been discovered absent any police misconduct. At the time of Detective Leaming's illicit line of questioning, a comprehensive search party of over two hundred

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his own recognizance after an illegal arrest, but later returned to the station to confess, removed any taint from the confession. 371 U.S. at 491.

31. 467 U.S. 431 (1984).

32. *See id.* at 436–37. The years of costly litigation, which Justice Stevens identifies in his concurring opinion as the real cost to society of the detective's misconduct here, can be traced by the following line of cases: *State v. Williams*, 182 N.W.2d 396 (Iowa 1970) (conviction in state supreme court); *Williams v. Brewer*, 375 F. Supp. 170 (S.D. Iowa 1974) (first habeas proceeding); *Williams v. Brewer*, 509 F.2d 227 (8th Cir. 1974) (affirming decision sustaining habeas petition); *Brewer v. Williams*, 430 U.S. 387 (1977) (affirming); *State v. Williams*, 285 N.W.2d 248 (Iowa 1979) (later proceeding); *Williams v. Nix*, 528 F. Supp. 664 (S.D. Iowa 1981) (habeas proceeding); *Williams v. Nix*, 700 F.2d 1164 (8th Cir. 1983) (reversing the court below and granting habeas relief).

33. Detective Leaming began a conversation with Williams, saying:

> I want to give you something to think about while we're traveling down the road. . . . They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is . . . and if you get a snow on top of it you yourself may be unable to find it. And since we will be going right past the area [where the body is] on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [Eve] and murdered. . . . [After] a snow storm [we may not be] able to find it at all.

467 U.S. at 435–36 (alterations in original).

34. *See id.* at 437.

35. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

36. *See id.* at 588.

community volunteers was within striking distance of the body's location.[37] Of course, once Williams had come clean as to the actual location, the search party was called off.[38] Nonetheless, the proximity of the search party, coupled with an impending blizzard, led the trial court to conclude that *had the search party been allowed to continue*, it would have discovered the body in "essentially the same condition as it was actually found."[39]

Armed with these facts, the Supreme Court was poised to endorse a doctrine already recognized by the vast majority of courts, both state and federal.[40] In admitting the evidence against Williams and officially adopting the inevitable discovery doctrine, the Court held: "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so little basis that the evidence should be received."[41]

So in essence, the inevitable discovery doctrine permits the prosecution to rely on a hypothetical independent source to admit evidence that otherwise would be suppressed under the exclusionary rule.[42]

Since its adoption in *Nix*, the inevitable discovery doctrine has been the subject of a fair amount of criticism. For example, some argue that the relatively low preponderance standard is inappropriate because the doctrine necessarily relies on a hypothetical reconstruction of the facts.[43] The Court's explicit rejection of a good faith requirement has also raised concerns among legal commentators.[44] In addition to doctrinal criticism, *Nix* left several questions open for interpretation, leading to circuit splits in application. For instance, the so-called "primary/derivative evidence

37. *Nix*, 467 U.S. at 448–49.

38. *Id.* at 436.

39. *Id.* at 438.

40. *Id.* at 440.

41. *Id.* at 444.

42. Of course, the doctrine does not open the door to an unlimited number of hypothetical reconstructions. The Court qualified the doctrine by emphasizing that "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment . . . ." *Id.* at 444–45 n.5.

43. The dissenters in *Nix* were unwilling to join the majority for precisely this reason, and would instead have required the prosecution to prove inevitable discovery by clear and convincing evidence. *See id.* at 458–60 (Brennan, J., dissenting); *accord* Eugene L. Shapiro, *Active Pursuit, Inevitable Discovery, and the Federal Circuits: The Search for Manageable Limitations Upon an Expansive Doctrine*, 39 GONZ. L. REV. 295, 309–11 (2003).

44. *See* Steven P. Grossman, *The Doctrine of Inevitable Discovery: A Plea for Reasonable Limitations*, 92 DICK. L. REV. 313, 360 (1988) (arguing that the Court does serious damage to the exclusionary rule and Fourth Amendment protections by permitting the government to use the doctrine to overcome police illegalities committed deliberately and flagrantly); *see also* John E. Fennelly, *Refinement of the Inevitable Discovery Exception: The Need for a Good Faith Requirement*, 17 WM. MITCHELL L. REV. 1085 (1991).

distinction" arose because it is unclear if the *Nix* Court meant to restrict the application of the exception to derivative evidence only.[45] Additionally, lower courts are split on whether the existence of an active search for the victim in *Nix* was a critical prerequisite (the "active pursuit" requirement).[46] Despite the ongoing criticism and division regarding application of the various nuances of the inevitable discovery doctrine, the requirement that the hypothetical independent source be lawful is one element that appeared quite straightforward. After all, the *Nix* Court unequivocally mandated that the prosecution rely on "lawful means."[47] Nevertheless, a pair of recent cases has created yet another inter-circuit conflict, and has thrust the lawful means requirement to the forefront of the inevitable discovery debate.

C. Interpretation of the Lawful Means Requirement in Light of The Prohibition Against Vicarious Exclusionary Challenges

The strand of Supreme Court jurisprudence that casts doubt on the interpretation of the lawful means requirement of the inevitable discovery doctrine is the prohibition on vicarious exclusionary challenges. In *Rakas v. Illinois*, the defendants sought to suppress a sawed-off rifle and shells seized by police during an illegal search of a vehicle where the defendants were merely passengers.[48] The Supreme Court rejected the defendants' motion to suppress, holding, "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."[49]

Like all exclusionary rule cases, the Court conducted a balancing test and concluded that the cost of excluding probative evidence in such circumstances was too great. The following passage from *Alderman v. United States* captures the Court's reasoning in this line of cases:

> The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify

45. *See* Golden, *supra* note 26, at 102. According to Golden, the minority of circuit courts limits the exception to derivative evidence only, whereas the majority view is to apply the exception to both primary and derivative evidence. *Id.* at 102–08.

46. Shapiro, *supra* note 43, 316–17 & nn.178–82.

> Five courts of appeals have expressly rejected the view that *Nix* imposes an active pursuit requirement. A sixth appears to have implicitly rejected it by its citation and apparent approval of such opinions. Four courts of appeals have employed an active pursuit approach. Another court has characterized the subject as "debatable," and a twelfth has not addressed the issue.

Id. at 316–17.

47. 467 U.S. at 444.

48. 439 U.S. 128, 129–30 (1978).

49. *Id.* at 133–34 (quoting Alderman v. United States, 394 U.S. 165, 174 (1969)).

> further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.[50]

Similarly, in *United States v. Payner*, the Supreme Court denied the defendant's attempt to suppress evidence illegally obtained from a third party.[51] Applying a typical exclusionary rule balancing test, the Court concluded that "where the illegal conduct did not violate the [defendant's] rights, the interest in . . . deterring such conduct is outweighed by the societal interest in presenting probative evidence to the trier of fact."[52]

The prohibition against vicarious exclusionary challenges clashes with the deterrence policy that lays at the foundation of the inevitable discovery exception to the exclusionary rule.[53] Each is firmly rooted in Supreme Court precedent, yet their overlap creates two possible interpretations of the lawful means requirement, which is the essence of the circuit split.

1. *"Lawful to the Relevant Defendant Before the Court:"* United States v. Scott

The First Circuit case of *United States v. Scott* involved an appeal from defendant Alan Scott's conviction for an extensive array of white-collar identity theft crimes.[54] Although there were several disputed issues in *Scott*,[55] the portion of the case implicating the inevitable discovery doctrine stemmed from an alleged illegal police search.[56] A summary of the facts is helpful to understand the ultimate holding.

On December 5, 1995, Scott drove Brian Stephens to a Circuit City store in Natick, Massachusetts.[57] There, Stephens attempted to purchase a camcorder by check and presented identification bearing a false name, address and date of birth.[58] After the check returned an unfavorable result from the cashier, Stephens exited without reclaiming his identification.[59] His suspicions aroused, the store manager called the Natick Police, and Officer Daniel Brogan arrived on the scene.[60] Stephens returned shortly thereafter, and upon seeing Officer Brogan, fled towards Scott's car, which was parked nearby.[61] Officer Brogan

50. 394 U.S. at 174–75.
51. 447 U.S. 727, 728–31 (1980).
52. *Id.* at 736 n.8.
53. Recent Case, United States v. Johnson, 118 HARV. L. REV. 794, 794 (2004).
54. 270 F.3d 30, 33 (1st Cir. 2001).
55. *See id.* at 33–34.
56. *See id.* at 42.
57. *Id.* at 38.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

apprehended Stephens and placed him in his police cruiser, and then approached the car where Scott was waiting.[62] After briefly questioning Scott, Officer Brogan removed him from the vehicle and conducted a pat-down search that yielded no contraband.[63] Nevertheless, the search continued, and Officer Brogan discovered a hypodermic needle in the glove compartment of the car.[64] He arrested Scott for possession of this item.[65] With Scott secure, Officer Brogan returned to his police cruiser and began to question Stephens.[66] When asked his age and place of residence, Stephens gave answers different from those listed on the false identification card, and Officer Brogan arrested him for attempting to pass a bad check and conspiring with Scott to do so.[67] Ultimately, Scott's car was searched incident to his arrest, and that search revealed some of the materials that he sought to have suppressed at trial.[68]

The First Circuit (affirming the district court) concluded that while Officer Brogan could point to specific and articulable facts to support the initial *Terry* stop, he lacked the requisite reasonable suspicion for the subsequent frisk and sweep of Scott's person and the search of the glove compartment in his car.[69] Thus, the discovery of the hypodermic needle was the product of an illegal search.[70] Accordingly, the evidence found during the inventory search incident to that arrest would normally be excluded as "fruit of the poisonous tree."[71] Nonetheless, that did not end the inquiry, as the inevitable discovery exception to the exclusionary rule remained in the prosecution's arsenal.[72]

The inevitable discovery doctrine was an issue in this case because the First Circuit concluded that the questioning of Stephens would have led inevitably to Scott's arrest, even had the illegal search of Scott's car never occurred.[73] Yet, the wrinkle that sets this case apart from its inevitable discovery predecessors is the independent means relied upon by the prosecution in its hypothetical reconstruction. This is because the First Circuit concluded that the police illegally arrested Stephens without

62. *Id.*

63. *Id.*

64. *Id.* at 39.

65. *Id.* Possession of a hypodermic needle without a prescription or other justification violated state law. *See* MASS. GEN. LAWS ch. 94C, § 27(a) (2000).

66. *Scott*, 270 F.3d at 39.

67. *Id.*

68. *Id.*

69. *Id.* at 41–42.

70. *Id.* at 42.

71. *See id.*

72. *Id.*

73. *Id.* at 42–43. In reaching this conclusion, the First Circuit affirmed the district court in regards to its hypothetical reconstruction of the procession of events that would have occurred had Officer Brogan never searched Scott, and had instead merely relied on his questioning of Stephens. *See id.* at 42. For purposes of this Note, the propriety of this reasoning is not an issue.

probable cause, and Officer Brogan then illegally questioned him without the warnings required by *Miranda v. Arizona*.[74] Thus, the inevitable discovery of the evidence stemmed from an "illegal" arrest and an "illegal" line of questioning.

The First Circuit acknowledged that the Supreme Court had invariably stated in *Nix* that the doctrine of inevitable discovery required "lawful" means.[75] Nonetheless, the First Circuit also correctly noted, "[n]one of those cases involved a third party and a defendant's claim that the inevitable discovery doctrine should not apply because the third party's rights had been violated."[76] *Scott* presented such a claim, and the First Circuit was forced to interpret the lawful means requirement as applied to a unique set of facts. Specifically, the First Circuit faced the novel issue of "whether the government in showing inevitable discovery may rely on an illegal action that did not violate the relevant defendant's personal rights."[77]

The First Circuit answered the above question in the affirmative, and employed two steps in its analysis. First, the court reasoned that when a third party is involved, the lawful means requirement is a relevant, as opposed to dispositive, factor in the inquiry.[78] In reaching this conclusion, the First Circuit focused on the close link between the inevitable discovery doctrine and the independent source doctrine, where the question is primarily one of causation.[79] According to the First Circuit's interpretation of Supreme Court precedent, under the independent source doctrine, suppression requires at least a finding that the challenged evidence would not have been obtained but for a constitutional violation *to the defendant in the case at issue*.[80] The Court reasoned that the principle should be the same for inevitable discovery, concluding, "a means by which challenged evidence would inevitably have been discovered that itself violates the law is not, *by that violation alone*, unlawful as to a defendant if those means did not violate the defendant's personal rights."[81] Thus, the First Circuit seized on the personal nature of the exclusionary rule and applied the same principles to the inevitable discovery doctrine.[82]

74. *Id.* at 43; *see also* Miranda v. Arizona, 384 U.S. 436, 467–68 (1966).
75. *Scott*, 270 F.3d at 43.
76. *Id.*
77. *Id.* at 44.
78. *See id.*
79. *Id.*
80. *Id.* at 44–45 (citing Segura v. United States, 468 U.S. 796, 814 (1984)).
81. *Id.* at 45.
82. *Id.* at 44.

Ordinarily, that Stephens did not receive *Miranda* warnings would not benefit Scott in his attempts to exclude evidence. Any illegality did not violate Scott's personal rights, and courts have restricted the exclusionary rule both in the context of searches and in the context of *Miranda* to violations of a defendant's personal rights.

The second step in the First Circuit's analysis was to ensure that its application of the inevitable discovery exception would not create an incentive for police misconduct. The court analyzed Officer Brogan's subjective motivations, and concluded that he had little incentive to violate Stephens's *Miranda* rights in order to utilize the inevitable discovery doctrine against Scott.[83] As additional factors, the First Circuit emphasized that neither constitutional violation was particularly egregious, and it was not clear whether Officer Brogan knew he was violating Stephens's *Miranda* rights in the first place.[84] In the end, the First Circuit held that application of the inevitable discovery doctrine in *Scott* would not act as an incentive to unconstitutional behavior, but suggested that "other cases may present different incentives and warrant a different outcome."[85]

2. *"Lawful to the World:"* United States v. Johnson

The Seventh Circuit rejected the logic of the First Circuit under an analogous set of circumstances in *United States v. Johnson*.[86] The ultimate criminal charges in *Johnson* pertained to the counterfeiting of U.S. currency, but those illegal activities and materials would not have come to light but for the initial discovery of a few packets of marijuana in a parked vehicle.[87] During the "wee hours" of a weekday morning in Markham, Illinois in August 2002, two police officers approached the vehicle where defendant Antoine Johnson sat in the driver's seat with two other passengers.[88] The officers ordered the three occupants to get out of the car.[89] While one of the officers searched under Johnson's seat and found drugs there, the other officer searched the passengers and found drugs and counterfeit money on their persons.[90] The officers then searched the trunk and found more evidence used against Johnson at trial, including additional counterfeit money and a color copier.[91] At trial, Johnson sought to suppress that evidence as the "direct and indirect products of an unlawful search."[92]

Similar to the circumstances of *Scott*, the court in *Johnson* concluded that the evidence was actually discovered by virtue of police

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Id. (citing Rakas v. Illinois, 439 U.S. 128, 140–50 (1978)).

83. *Id.* at 45.

84. *Id.*

85. *Id.*

86. *See* 380 F.3d 1013, 1017–18 (7th Cir. 2004).

87. United States v. Johnson, 257 F. Supp. 2d 1142, 1143 (N.D. Ill. 2003), *rev'd*, 380 F.3d 1013 (7th Cir. 2004)).

88. *Id.* at 1142–43.

89. *Johnson*, 380 F.3d at 1014.

90. *Id.* at 1014–15.

91. *Id.* at 1015.

92. *Johnson*, 257 F. Supp. 2d at 1142.

misconduct.[93] Thus, Johnson argued that the search underneath his seat was illegal, and the incriminating evidence in the trunk should be suppressed as fruits of the poisonous tree.[94] Nonetheless, the district court concluded that the evidence would have been inevitably discovered absent the illegal search of Johnson.[95] Specifically, the contraband found on the passengers would have given the officers probable cause to search the rest of the vehicle, and had they done so they would have found Johnson's incriminating possessions in the trunk.[96] The Seventh Circuit also affirmed the district court in its finding that the officer's search of the passengers was illegal.[97] Therefore, the court faced a scenario similar to that confronted by the First Circuit in *Scott*, and was forced to interpret the lawful means requirement. The *Johnson* court phrased the issue as follows: "The question in this case is whether it matters if the evidence seized illegally from the defendant had an alternative source in another *illegal* search but one that the defendant could not have challenged directly."[98]

Writing for a unanimous panel, Judge Posner held that it did in fact matter that the alternative source was an illegal search, and held the inevitable discovery doctrine inapplicable.[99] Unlike the First Circuit, the Seventh Circuit was unwilling to dispense with the lawful means requirement when a third party is involved, holding it to be "part of the essential logic of the rule."[100] The crux of Judge Posner's opinion was that two wrongs should not make a right. He reasoned:

> The government's position is that because there were two illegal searches in this case no one can invoke the exclusionary rule against the use of the evidence obtained by the searches. In other words, the

93. The district court concluded that at most, the facts supported an initially valid approach to the car in *Terry* terms, but not the requisite reasonable suspicion for a search of the car. *Id.* at 1146. On appeal, the Seventh Circuit asserted that the officers did not have grounds for arrest or even a *Terry* stop. *Johnson*, 380 F.3d at 1014. Regardless, the bottom line in both decisions was that the evidence was actually obtained by virtue of police misconduct, and thus would normally be suppressed under the exclusionary rule.

94. *Johnson*, 380 F.3d at 1015.

95. *Johnson*, 257 F. Supp. 2d at 1147.

96. *Johnson*, 380 F.3d at 1015. It should be noted here that because of the virtual simultaneousness of the searches of Johnson and the passengers, the Seventh Circuit prefaced its opinion by saying that it was not sure which doctrine—inevitable discovery or independent source—ruled this case. *Id.* at 1014. Yet this merely illustrates that the doctrines are very similar, and because the First Circuit also recognized this link, the Seventh Circuit's confusion does not materially affect the analysis. In both cases, and for the purposes of this Note in general, the inevitability of the discovery is not a disputed issue.

97. *Id.* at 1015.

98. *Id.* at 1014.

99. *Id.* at 1017–18. Judges Williams and Wood joined in the opinion. *Id.* at 1041. Recognizing that *Johnson* created a circuit split, Judge Posner circulated the decision to the full court in advance of publication, and no judge voted to hear the case en banc. *Id.* at 1018.

100. *Id.*

> more illegal searches there are, the narrower is the scope of the application of the exclusionary rule. We cannot see what sense that makes.[101]

As further support for his "two wrongs do not make a right" principle, Judge Posner analogized the situation to the principle of concurrent causation in tort law.[102] Under that doctrine, a tortfeasor may not escape liability by pointing to an alternative *unlawful* cause of the damage inflicted "for the practical reason that tortious activity that produces harm would go unsanctioned otherwise."[103] Applying such an analysis to the case at hand, Judge Posner concluded that the Markham Police could not invoke an exception to the exclusionary rule (and thus escape liability) by pointing to another *unlawful* search.[104] In reaching this conclusion, the Seventh Circuit acknowledged the Supreme Court's prohibition against vicarious Fourth Amendment challenges, but dismissed it as inapplicable to the circumstances at hand.[105] Judge Posner held the facts of *Johnson* to be fundamentally distinguishable from cases such as *Rakas*, because here the defendant *was* trying to suppress evidence obtained during a violation of his personal constitutional rights.[106] After all, the only reason that the defendant was forced to challenge the search of the passengers was by virtue of the prosecution's attempt to invoke the inevitable discovery doctrine.

The Seventh Circuit also diverged from the First Circuit in its assessment of the incentives that its rule would present to future law enforcement officials. If the Seventh Circuit were to allow the prosecution to rely on the illegal search of the passengers, then

> in any case in which the police have a strong hunch (though not enough to enable them to obtain a warrant or to search without a warrant) that all the members of a linked group have some contraband, the police could, if the government is right, search all the members of the group without fear that any contraband found on them could not be used in evidence.[107]

Thus, according to Judge Posner, the interpretation of the lawful means requirement adopted by the First Circuit would create a positive incentive for future police misconduct, running afoul of the deterrent purpose behind the exclusionary rule.[108]

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101. *Id.* at 1017.

102. *Id.* at 1016.

103. *Id.*

104. *Id.*

105. "The search of the passengers was illegal, but normally *A* cannot challenge the legality of the search of *B* even when the search produces information used to convict *A*." *Id.* at 1015 (citing Rakas v. Illinois, 439 U.S. 128, 132–33 (1978)).

106. *Id.*

107. *Id.* at 1015–16.

108. *Id.*

The *Johnson* and *Scott* cases represent an important circuit split in the interpretation of the lawful means requirement of the inevitable discovery doctrine when multiple parties are involved. While the Supreme Court's *Nix* decision unequivocally calls for lawful means, therefore supporting the Seventh Circuit's interpretation, the Court's prohibition on vicarious exclusionary challenges lends support to the First Circuit's conclusion. The question remains as to which interpretation is the better one and why.

II. ANALYSIS

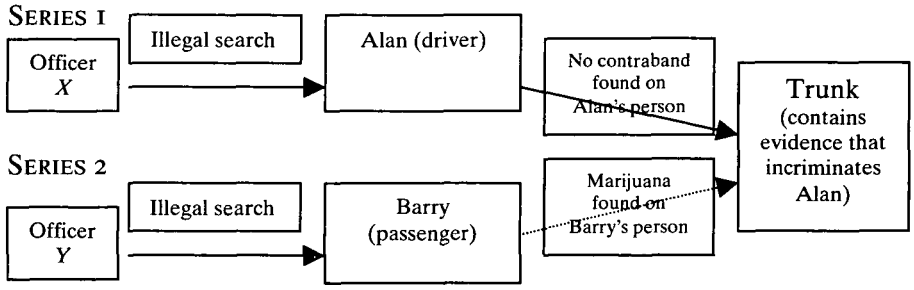
A. HYPOTHETICAL: THE EVENTS OF OCTOBER 31

In order to determine the correct interpretation of the lawful means requirement, it is helpful to frame the analysis around one concrete set of facts. The hypothetical factual scenario that follows will be the basis for the further analysis of this Note, and will be hereinafter referred to as "The events of October 31."[109]

On October 31, two police officers approach Alan's vehicle stopped in a parking lot, in which Alan sits in the driver's seat, and Barry sits in the front passenger seat. The officers suspect that the car contains contraband, yet they lack both the reasonable suspicion to support a frisk and sweep of Alan and Barry, as well as probable cause to arrest the men. Nonetheless, the officers proceed with the investigation. Officer *X* reaches the driver's side window and orders Alan out of the car. Officer *X* then illegally searches Alan and finds no contraband on his person. Officer *X* proceeds to illegally search the trunk of Alan's car, where he finds contraband, including a large amount of counterfeit currency and false credit cards. While Officer *X* is conducting this illegal line of searches, Officer *Y* has ordered Barry out of the car, illegally searched his person, and discovered a bag of marijuana. Shortly thereafter, both men are arrested. The following diagram depicts the series of events, with Officer *X*'s investigation labeled "Series 1," and Officer *Y*'s search of Barry labeled "Series 2":

109. This hypothetical is basically a synthesis of the facts of *Scott* and *Johnson*. Although it is distinguishable in certain respects from the facts of *Scott*, because there the violation of the accomplice's rights was an illegal line of questioning, the disparity is not of such weight that it has a material effect on the analysis. For the purposes of this Note, assume that the First Circuit would follow the same line of reasoning and reach the same conclusion as it did in *Scott* if it were confronted with the facts in this hypothetical.

FIGURE 1: EVENTS OF OCTOBER 31



In Alan's subsequent trial proceeding, he is charged with various counterfeiting offenses, and the prosecution attempts to introduce the incriminating evidence found in the trunk of his car. Alan moves to suppress the evidence on the basis that it was obtained as a result of Officer *X*'s illegal search of his person, and therefore should be excluded as fruit of the poisonous tree. The prosecution grants this primary illegality, but nonetheless asserts that the evidence would have inevitably been discovered absent the illegal search of Alan. Specifically, the prosecution argues that the marijuana found on Barry's person gave Officer *Y* probable cause to search the trunk, and thus the evidence would have been discovered even if Officer *X* had never illegally searched Alan. The dashed line from Barry to the trunk represents the hypothetical independent source of discovery of the evidence.[110]

Of course, the decision of whether or not to admit the evidence against Alan will turn on whether the court adopts the First or Seventh Circuit's interpretation of the word "lawful." Applying the First Circuit's interpretation, the illegal search of Barry was lawful in relation to Alan, and the prosecution can rely on it to invoke the inevitable discovery doctrine. Under the Seventh Circuit's interpretation, however, the prosecution may not rely on the illegal search of Barry because it was not lawful in the abstract. Accordingly, the exception to the exclusionary rule does not apply, and the evidence should be suppressed as fruits of the poisonous tree.

Series 2 contains the key sequence of events. In the inevitable discovery context, the court grants the primary illegality, so Series 1 is temporarily set aside. Then, if the line from Barry to the trunk were solid instead of dashed, meaning that the evidence had actually been obtained as a result of Officer *Y*'s illegal search of Barry, the Court's prohibition

110. The line is dashed because Officer *Y* never actually searched the trunk following his illegal search of Barry. The evidence was actually discovered by Officer *X* during his illegal search of the trunk. Thus, Series 1 represents reality, and Series 2 is the prosecution's hypothetical reconstruction of the facts used to invoke the inevitable discovery doctrine.

on vicarious exclusionary challenges dictates that the evidence must be admitted. Yet the line is dashed, and Series 2 only comes into play as a hypothetical independent source for discovery of the evidence in the trunk. To accept the Seventh Circuit's reasoning would be advocating the proposition that the outcome should be different when Series 2 is a hypothetical as opposed to reality. As further analysis in this Note reveals, this is indeed the correct conclusion.

B. The Correct Interpretation of the Lawful Means Requirement

The Seventh Circuit's interpretation of the lawful means requirement of the inevitable discovery doctrine is the correct one. Not only does interpreting "lawful" to mean "lawful to the world" afford proper credence to the doctrine as laid out by the Supreme Court in *Nix*, but it also rings true in light of several policy considerations and is the more desirable result from a justice standpoint.

In *Nix*, the Supreme Court adopted the inevitable discovery doctrine to properly balance the scales of justice. All exclusionary rule cases involve a necessary balancing test, where the court balances the interest of society in deterring police misconduct, on the one hand, and the public interest in having juries receive all probative evidence of a crime, on the other.[111] To lay the foundation for its acceptance of the inevitable discovery doctrine, the Supreme Court emphasized that the balance is properly struck "by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred."[112] In the typical inevitable discovery case, where the evidence would have been discovered by lawful means, admitting the evidence puts the police in the same position that they would have been in absent any misconduct.

Here, however, where the prosecution relies on unlawful means, admission of the evidence would put the police in a better position than it would have been in absent any misconduct, allowing them to profit from their illicit behavior. Absent any police misconduct, the marijuana would not have been found on the person of Barry. Thus, the chain of inevitability would break without the illegal search. Accordingly, exclusion of the evidence in the hypothetical puts the police in the same, not a worse, position than they would have been in absent any police misconduct. This is the proper societal balance that the Supreme Court called for in *Nix*.

In addition, Judge Posner's rejection of the "two wrongs make a right" principle is very attractive from a common sense standpoint. Officer *X* illegally searched Alan, and therefore the evidence discovered

111. *See* Nix v. Williams, 467 U.S. 431, 443 (1984).
112. *Id.*

in the trunk would normally be suppressed as fruits of the poisonous tree. The prosecution's argument is that because Officer *Y* illegally searched Barry, the evidence should be admitted. In other words, the more illegal searches there are, the narrower the application of the exclusionary rule. In *Johnson*, the Seventh Circuit explicitly rejected such a bizarre conclusion. There, Judge Posner stressed that there is a need for punishment when the government has only relied on a series of illegal acts.[113] This common sense appeal led the Supreme Court of Kansas to endorse the Seventh Circuit's decision in the only subsequent case to confront a similar set of facts.[114]

Furthermore, the most compelling argument in favor of the Seventh Circuit's interpretation of the lawful means requirement is that the opposite conclusion would create an incentive for future violations of constitutional rights. If police officers such as Officer *X* and Officer *Y* are allowed to escape liability for their illicit behavior, then there will be nothing to deter them from engaging in such illegal searches in the future. Applying the inevitable discovery doctrine here would allow all of the evidence to be admitted against Alan in his trial. In addition, the evidence found on Barry would be admissible against him in his subsequent trial, because the prosecution can argue that because Officer *X* found incriminating evidence in the trunk, that would have given him probable cause to search the other passengers in the vehicle. Furthermore, if any of the contraband discovered by Officer *X* in the trunk also served to incriminate Barry, it would be admissible through the inevitable discovery doctrine. This type of criss-crossing strategy would become prudent prosecutorial practice, and would create a virtual manual for police officers to compile as many constitutional violations as possible, knowing that all of the evidence could potentially be admitted by virtue of the inevitable discovery doctrine.[115] This kind of behavior must be deterred, and eliminating the threat of exclusion would give officers who approach a vehicle with multiple passengers an incentive to disregard the constitutional rights of those individuals. The inevitable discovery doctrine is an exception to the exclusionary rule, not a loophole.

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113. *Johnson*, 380 F.3d at 1016.

114. State v. Ackward, 128 P.3D 382, 397 (Kan. 2006). In *Ackward*, a gun was seized in violation of the defendant's right to counsel. *Id.* at 396. The prosecution argued that the evidence would have been discovered as a result of an illegal search of somebody else's house, to which the defendant could not object. *Id.* The court rejected the inevitable discovery claim, citing the Seventh Circuit's reasoning: "[T]he *Johnson* court could see no sense in the government's position and held that the inevitable discovery of evidence by unlawful means did not render it admissible. We agree." *Id.* at 397.

115. It can be argued that significant disincentives exist, such as departmental discipline and civil liability, as the Supreme Court noted in *Nix* itself. 467 U.S. at 446. Yet as Judge Posner emphasized in *Johnson*, "if damages were considered a completely adequate deterrent to violations of the Fourth Amendment, the exclusionary rule would have been abandoned long ago." 380 F.3d at 1016.

While the conclusion that Judge Posner reaches must be the correct one from the standpoint of justice, his opinion nonetheless does not adequately address the conflict with the Supreme Court's prohibition against vicarious Fourth Amendment challenges. Judge Posner deals with this conflict by characterizing the prohibition against vicarious challenges as a standing principle.[116] He then dismisses that standing issue as not applicable:

> This would be correct if Johnson were trying to prevent the contraband seized from the passengers, as distinct from the trunk of the car, from being used against him.... But all he is trying to do is prevent the use of evidence seized from him—from the trunk of *his* car. And so the question is not his standing to challenge the use against him of evidence seized illegally from other people ....[117]

Judge Posner is correct that Johnson's rights were violated, but that cannot dispose of the issue completely because the Supreme Court has previously rejected analysis similar to Judge Posner's standing analysis. In *Rakas*, the Supreme Court emphasized, "[t]his Court's long history of insistence that Fourth Amendment rights are personal in nature has already answered many of the traditional standing inquiries, and we think that definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing."[118] Thus, it can be argued that the Court's prohibition of vicarious Fourth Amendment challenges carries beyond the threshold standing inquiry and applies throughout the analysis. Accordingly, *Rakas* prohibits Alan from making the argument that the evidence should be excluded because the search of Barry was illegal. At the very least, *Rakas* suggests that because Fourth Amendment rights are personal rights, then the lawful means requirement of the inevitable discovery doctrine is also personal in nature.

This apparently irreconcilable conflict is why Judge Posner's analogy to tort law is so attractive. The tort analogy is a clever way to bridge the apparent gap, and reaches the correct result from a justice standpoint while rooting it in well-established legal principles. To be sure, there are other options that the Supreme Court could pursue in order to reconcile the conflict. For example, the Court could change either the rule's application by abandoning the prohibition on third party exclusionary challenges, or the rule's justification by allowing that there are values other than deterrence that justify the rule and guide its application.[119] There is also the more radical possibility of abandoning the exclusionary

116. *Johnson*, 380 F.3d at 1015.
117. *Id.*
118. 439 U.S. 128, 140 (1978).
119. Recent Case, *supra* note 53, at 801 n.48.

rule altogether.[120] But as it stands, the conflict exists, and the tort analogy is a nice way to resolve the inconsistencies in circuit court application and adopt the most just interpretation of the lawful means requirement. However, while Judge Posner's chosen tort analogy reaches the correct conclusion from a justice standpoint, it is misguided.

C. Criticism of the Substantial Factor Analogy

In *Johnson*, Judge Posner analogizes the facts to the substantial factor test in tort law to support his conclusion that the lawful means requirement should be interpreted as lawful to the world.[121] A brief explanation of the substantial factor test is instructive.

In the negligence realm of tort law, the plaintiff must usually "prove by a preponderance of the evidence that *but for* the defendant's conduct, the plaintiff would not have been harmed."[122] Nonetheless, the substantial factor test is used instead of the "but for" test in cases of simultaneous redundant causes, as illustrated in the case of *Anderson v. Minneapolis, Saint Paul and Sault Ste. Marie Railway Co.*[123] As *Anderson* suggests, if defendant *A* is careless with fire on one side of a plaintiff's house, and defendant *B* is careless with fire on the other side of the house, and both fires merge to destroy it, then each defendant may be considered a substantial factor and be held liable.[124] While the conduct of neither *A* nor *B* may be considered a "but for" cause of the damage, it would seem unfair to exonerate both defendants in such a case.[125] Thus, under the substantial factor test, multiple tortfeasors who concurrently cause an indivisible injury are jointly and severally liable, meaning that each can be held liable for the entire injury.[126]

The substantial factor test is an attractive analogy for inevitable discovery cases such as *Scott* and *Johnson* that leads to the correct ultimate conclusion. Nevertheless, there are several flaws in the comparison. To illustrate the subtle inconsistencies, consider the events of October 31 using Judge Posner's approach. The ultimate question is whether or not the police officers will be "liable" for their misconduct in the form of suppression of the incriminating evidence in Alan's subsequent trial.

The first step in the inevitable discovery analysis illustrates a

120. Some critics have argued if favor of this radical possibility. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785–800 (1994).

121. 380 F.3d at 1016. The "substantial factor" test is the same as the concurrent causation test. In *Johnson*, Judge Posner uses the term "concurrent causation," but for the purposes of this Note, it is interchangeable with the substantial factor test.

122. JOHN L. DIAMOND, CASES AND MATERIALS ON TORTS 198 (2001).

123. 179 N.W. 45, 49 (Minn. 1920).

124. *Id.*; *accord* DIAMOND, *supra* note 122, at 204.

125. DIAMOND, *supra* note 122, at 204.

126. *See* Northington v. Marin, 102 F.3d 1564, 1569 (10th Cir. 1996).

discrepancy in the comparison to the substantial factor test. When the prosecution attempts to invoke the inevitable discovery doctrine to admit the evidence against Alan, the court sets aside Series 1, and it is as if the illegal search of Alan had never taken place.[127] And because Alan cannot challenge the illegal search of Barry, the evidence is admissible, and the police are not "liable." However, Judge Posner's interpretation of the lawful means requirement rejects this conclusion. When you bring Series 1 back into the equation, and Series 2 becomes a hypothetical reconstruction of the facts, then the evidence should be suppressed because the prosecution has not relied on truly lawful means. Thus, when there is one violation (Series 2), the evidence is admissible against Alan, but when there are two violations, the evidence is inadmissible. The outcome therefore switches from the first step (no liability), to the ultimate conclusion in favor of suppression of the evidence.

Turning to the substantial factor analogy, the end result is the same, but the first step is distinguishable. Consider facts similar to the *Anderson* case, where two fires, Fire *A* and Fire *B*, are simultaneous redundant causes of the destruction of the plaintiff's house. Fire *A* can be analogized to Series 1 in the inevitable discovery hypothetical, and Fire *B* to Series 2. And like that example, let us imagine that Fire *A* never happened. If that were the case, then Fire *B* would still have burned down the plaintiff's house, and there would still be liability. Bringing Fire *A* back into the equation, the substantial factor test dictates that both defendants *A* and *B* are jointly and severally liable. Thus, when there is one negligent actor (step one), there is liability, and when there are two negligent actors (step two), there is also liability.

The different starting points illustrate a subtle flaw in Judge Posner's chosen analogy. The first step in the inevitable discovery analysis is that there is no liability if you take away Series 1 (because of the Court's prohibition against vicarious exclusionary challenges). On the other hand, in the substantial factor analysis, if you take away Fire *A* there is still liability and the plaintiff will be able to recover from defendant who started Fire *B*. Thus, although the ultimate result is the same under both, the first step in the analysis is distinguishable.

Furthermore, in concluding his tort analogy, Judge Posner states, "[t]he tortfeasor cannot avoid liability by pointing to an alternative *unlawful* cause of the damage that he inflicted."[128] This is true, yet under the substantial factor test, the tortfeasor also cannot avoid liability by pointing to an alternative *lawful* cause of the damage. To be sure, some commentators have proposed that courts not utilize the substantial factor

127. *See supra* Part II.A.

128. United States v. Johnson, 380 F.3d 1013, 1016 (7th Cir. 2004).

test when one or more of the causes is non-negligent.[129] The Restatement (Second) of Torts rejects this approach and applies the substantial factor test for simultaneous causes even if one or more of the causes is natural.[130] On the other hand, the prosecution can certainly avoid liability in the inevitable discovery context by pointing to an alternative lawful cause of the damage. For example, if Officer *Y*'s search of Barry was legal, then there is little doubt that the evidence should be admissible. This distinction is another factor that weighs against Judge Posner's analogy to the substantial factor test.

Finally, Judge Posner identifies a possible flaw in his reasoning, yet dismisses it rather tersely: "The concurrent-causation case may seem to differ from our case insofar as both fire makers violated the plaintiff's rights, whereas here the tortious search of Johnson's passengers did not violate Johnson's rights. But actually the issue is the same."[131] Query whether this difference is as negligible as Judge Posner asserts it to be. For instance, imagine a substantial factor scenario where Fire *A* destroys the house of the plaintiff's neighbor, which is analogous to Officer *Y* illegally searching Barry, the passenger. Further, let us say that Fire *A* was so powerful, that after burning the neighbor's house, it would have spread and burned down the plaintiff's house an hour later. At that moment, Fire *B* sweeps in and destroys the plaintiff's house (which would have been destroyed an hour later anyway). Under these circumstances, some courts would apply the incremental loss component of the traditional "but for" test, and Defendant *B* would only be liable for the short one-hour "life expectancy" of the plaintiff's house.[132] Yet if Fire *B* had burned the plaintiff's house at the same time as Fire *A*, then Defendant *B* would be liable for the entire value. "In essence, the substantial factor test produces a different result from the 'but for' test in cases of simultaneous causes, but not in cases of *nearly* simultaneous causes."[133]

Applying this principle to the events of October 31, the critical simultaneousness of the substantial factor test calls Judge Posner's analogy into question. Series 2 is analogous to Fire *A* in the above example. Fire *A* destroys the house of the plaintiff's neighbor, and is of such force that it would burn the plaintiff's house shortly thereafter. Likewise, Officer *Y*'s illegal search of Barry uncovered marijuana that would have led him to ultimately search the trunk. Yet, before that could

129. *See, e.g.*, Robert J. Peaslee, *Multiple Causation and Damages*, 47 HARV. L. REV. 1127, 1131 (1934).

130. *See* RESTATEMENT (SECOND) OF TORTS § 432(2) cmt. d (1988).

131. *Johnson*, 380 F.3d at 1016.

132. *See* Dillon v. Twin State Gas & Elec. Co., 163 A. 111, 114–15 (N.H. 1932); *see also* DIAMOND, *supra* note 122, at 205.

133. DIAMOND, *supra* note 122, at 205.

happen, Officer *X* illegally searched Alan, and then swept in and searched the trunk himself. This is similar to Fire *B*, which swept in and burned the plaintiff's house before Fire *A* reached it. Applying the incremental loss component of the tort analogy, Officer *X* is not necessarily liable for the evidence obtained in the trunk. The critical simultaneousness of the substantial factor test suggests that under certain circumstances the analogy supports the First Circuit's interpretation, where the police will escape liability as long as they did not have the incentive to violate the search victim's rights. As the First Circuit emphasized, different cases may present different incentives and warrant different outcomes. Regardless, it is not at all clear that the issues are in fact the same, as Judge Posner claims.

Admittedly, the substantial factor analogy is appealing, and the inconsistencies are not so strong as to entirely undermine Judge Posner's overall analysis. Nonetheless, the inconsistencies do suggest that the analogy is not the best one available. Instead of the substantial factor test, the conception of "duty" in negligence law provides a better analogy to support the conclusion that the lawful means requirement of the inevitable discovery doctrine should be interpreted as lawful to the world.

D. THE *PALSGRAF* DEBATE PROVIDES THE BEST ANALOGY

The tort concept of "duty" in negligence actions presents the best analogy to help reconcile the conflict between the prohibition on vicarious exclusionary challenges and the lawful means requirement of the inevitable discovery doctrine. In the tort realm of negligence, the duty element limits a defendant's responsibility for unreasonable conduct that caused the plaintiff injury.[134] In particular, duty focuses on to *whom* the defendant owes an obligation to conform to an established standard of conduct.[135] There are two conceptions of the duty requirement, illustrated by the majority and dissenting opinions in *Palsgraf v. Long Island Railroad Co.*,[136] which supply the framework for the analogy here.

Palsgraf is probably the most famous case in all of tort law, and certainly one of the most controversial.[137] The plaintiff (Mrs. Palsgraf) was standing on a platform of the defendant's railroad when a train arrived at the station.[138] Two men hurried forward to catch the train as it was departing, and one of the men was carrying a small package covered in newspaper.[139] The man with the package jumped aboard the car, but

134. *Id.* at 244.
135. *Id.*
136. 162 N.E. 99 (N.Y. 1928).
137. William L. Prosser, Palsgraf *Revisited*, 52 MICH. L. REV. 1, 1 (1953).
138. *Palsgraf*, 162 N.E. at 99.
139. *Id.*

then wavered, and a guard pushed him from behind to help him inside.[140] The push dislodged the package (which turned out to contain fireworks), the package exploded when it hit the ground, and the shock from the explosion knocked down some scales many feet away.[141] The scales struck Mrs. Palsgraf, causing her injuries.[142] Mrs. Palsgraf sued for damages from those injuries, and her recovery ultimately hinged on whether the guard, who could not have known that the package contained explosives, owed a duty to Mrs. Palsgraf, who stood many feet away at the other end of the platform when the explosion occurred.[143]

Writing for the majority, Judge Cardozo concluded that there was no liability because there was no negligence toward the plaintiff.[144] Judge Cardozo interpreted the element of duty as a relational concept whereby a defendant owes a duty to refrain from negligent conduct only to victims in the foreseeable zone of danger.[145] "Proof of negligence in the air, so to speak, will not do."[146] Judge Cardozo further reasoned: "The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another."[147] The conduct of the guard toward the man with the package involved no foreseeable risk that the plaintiff might be injured.[148] It was therefore not a tort as to her, and as a matter of law she could not recover.[149] In essence, even though the guard may have breached the requisite standard of conduct and caused the plaintiff's injuries, the railroad was able to avoid liability because of the limitation drawn around the zone of foreseeability.[150] Judge Cardozo's opinion represents the current majority view and is endorsed by the Restatement (Second) of Torts.[151]

In dissent, Judge Andrews rejected the majority's proposition that a duty is owed only to foreseeable victims.[152] Judge Andrews discarded the relational concept of duty as too narrow, and held that negligence is a wrong toward anyone in fact injured by the negligent act.[153] Instead of owing a duty only to those victims in the foreseeable zone of danger, "[e]very one owes to the world at large the duty of refraining from those

140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. Prosser, *supra* note 137, at 5.
145. DIAMOND, *supra* note 122, at 244.
146. *Palsgraf*, 162 N.E. at 99 (quoting Martin v. Herzog, 126 N.E. 815, 816 (N.Y. 1920)).
147. *Id.* at 100.
148. Prosser, *supra* note 137, at 5.
149. *Id.*
150. DIAMOND, *supra* note 122, at 245.
151. *Id.* at 244.
152. *Palsgraf*, 162 N.E. at 102–103 (Andrews, J., dissenting).
153. *Id.*; *accord* Prosser, *supra* note 137, at 6.

acts that may unreasonably threaten the safety of others."[154] Furthermore, because the explosion caused the scales to fall, which in turn caused the plaintiff's injuries, she was not suing as the vicarious beneficiary of a breach to another. To the contrary, "[h]er action is original and primary. Her claim is for a breach of duty to herself . . . ."[155] While Judge Andrews's opinion is in dissent, it nevertheless represents a viable minority view followed by courts today.[156]

The juxtaposition of the *Palsgraf* opinions offers an instructive analogy to reconcile the apparent conflict between the Supreme Court's prohibition against vicarious exclusionary challenges and the inevitable discovery doctrine. To apply the tort analogy to the criminal procedure realm, recall the events of October 31, and imagine that Alan is once again before the court and has filed a motion to suppress the incriminating evidence.

Setting aside an inevitable discovery claim for the time being, the prohibition against vicarious Fourth Amendment challenges is akin to Judge Cardozo's relational concept of duty. To see this, remove Series 1 from the equation, so that the incriminating evidence in the trunk was actually found by virtue of the illegal search of Barry. Under these circumstances, Alan's personal constitutional rights were not violated, and his only avenue to suppress the evidence is to vicariously assert the Fourth Amendment rights of Barry. Of course, the Supreme Court prohibits such challenges, and the evidence will be admissible against Alan despite the fact that it was obtained as a result of an illegal search of Barry. In other words, the police officers will not be "liable" for their misconduct. Like Judge Cardozo's limitation on duty in a negligence action, here, the Supreme Court has injected a personal, relational concept into its exclusionary rule jurisprudence. The Court acknowledges that the evidence was obtained through an illegal search, but that the officer really only had a duty to the victim of the search. The evidence will not be admissible against Barry, but beyond that, the Court limits the "liability" of the police officers. Analogous to Mrs. Palsgraf, Alan is outside of the foreseeable zone of danger of the search of Barry, and therefore is not entitled to compensation in the form of suppression of the evidence. The Court is willing to hold the police liable with respect to the victim of the search, but is unwilling to extend that "liability" to third parties.

On the other hand, when Series 2 is relied upon as a hypothetical reconstruction to invoke the inevitable discovery doctrine, the Court should analyze it under the more exacting standard used by Judge

154. *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).
155. *Id.*
156. DIAMOND, *supra* note 122, at 245.

Andrews, which is analogous to Judge Posner's "lawful to the world" interpretation of the lawful means requirement. Here, Series 1 comes back into play, as that is how the incriminating evidence in the trunk was actually obtained. Nonetheless, as in any inevitable discovery claim, the Supreme Court grants the initial illegality and puts it aside. The prosecution then relies on Series 2 to argue that the evidence would have been inevitably discovered absent the illegal search of Alan because of the drugs found during the illegal search of Barry. And as we saw above, if this were indeed how the facts had played out, Alan may not challenge the validity of Series 2 because it did not violate his personal constitutional rights, and the evidence is admissible. Now, the question remains as to why the outcome should be any different if we are talking about a hypothetical reconstruction of the facts as opposed to reality. Judge Andrews's broad conception of duty in a negligence action provides the answer by analogy.

In a hypothetical reconstruction in the inevitable discovery realm, the "duty" owed by law enforcement officers should be analyzed under the more demanding standard proposed by Judge Andrews and endorsed by a minority of courts. Judge Andrews asserted that a negligent actor owes a duty to the public at large, and not merely those in the foreseeable zone of danger. The starting point of an inevitable discovery claim distinguishes a hypothetical reconstruction of the facts from those facts existing in the context of a traditional vicarious Fourth Amendment challenge. The key is that in the inevitable discovery realm, the police have already blundered, so the starting point is a violation of Alan's personal constitutional rights. Thus, when the prosecution relies on Series 2 to negate a violation of the defendant's personal rights, the police officers should be held to a higher standard. Instead of only having a duty to the victim of the search, Officer *Y* has a duty to the world at large to conform to constitutional requirements. Thus, if we are going to allow the police officers to escape liability with the inevitable discovery exception to the exclusionary rule, they must prove that the search relied upon in the hypothetical was lawful to the world. Therefore, the prosecution may not rely on the search of Barry unless it was lawful in the abstract, not just lawful in relation to Alan. Here, because Officer *Y*'s search of Barry was illegal, it does not satisfy the lawful means requirement analyzed under Judge Andrews's conception of duty. Furthermore, like Mrs. Palsgraf in Judge Andrews's opinion, Alan is vindicating a breach of his personal rights. The evidence was actually obtained in violation his personal Fourth Amendment rights, and it is only as a result of the prosecution's inevitable discovery argument that he is forced to vicariously assert the rights of Barry.

Thus, the *Palsgraf* opinions offer an excellent analogy under which to analyze the interpretation of the lawful means requirement when

multiple parties are involved. In the typical case where evidence is illegally seized from a third party not before the court, the evidence is admissible against the relevant defendant. This is the essence of the prohibition against vicarious exclusionary challenges, and analogous to Judge Cardozo's conception of duty in *Palsgraf*. However, when the illegal search of a third party is the basis for an inevitable discovery claim, Judge Andrews's conception of duty should apply. The police cannot escape liability by pointing to an alternative unlawful source, as the officers have a duty to the public at large in the context of a hypothetical reconstruction of the facts in the inevitable discovery realm. Ultimately, the *Palsgraf* analogy pays proper credence to both the prohibition against vicarious exclusionary challenges and the lawful means requirement of the inevitable discovery doctrine. Analyzing the conflict under principles of tort law is instructive, and the *Palsgraf* debate provides the most effective analogy.

CONCLUSION

The Seventh Circuit's *Johnson* decision has revealed yet another inconsistent application of the elements of the inevitable discovery doctrine. The Supreme Court needs to bring some clarity to this amorphous doctrine, as divergent application may have significant effects on police procedure and prosecutorial practice. A broad interpretation of the lawful means requirement must be the correct one. Otherwise, law enforcement officials will have a positive incentive to disregard constitutional rights, and prosecutors will be able to implement the inevitable discovery doctrine as a loophole through the exclusionary rule. Nonetheless, such a broad interpretation unavoidably collides with the Supreme Court's prohibition against vicarious exclusionary challenges.

Applying tort principles to the issue at hand is an excellent avenue to reach the just conclusion while escaping the conflicting strings of Supreme Court jurisprudence. Judge Posner chose the substantial factor test, which is attractive, yet subject to criticism. The better analogy is illustrated by the majority and minority opinions in *Palsgraf*, which represent the majority and minority conceptions of duty in negligence actions, respectively. Ultimately, Judge Andrews's "duty to the public at large" conception should be injected into the inevitable discovery realm, so that the lawful means requirement is interpreted as "lawful to the world." This interpretation halts an unwarranted expansion of the inevitable discovery doctrine, and maintains the integrity of the exclusionary rule.

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